

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

77-2017

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-2017

SALVATORE ANNUNZIATO,
Appellee

vs.

JOHN R. MANSON, COMMISSIONER OF CORRECTIONS
Appellant

**On Appeal From the United States District Court
for the District of Connecticut**

SUPPLEMENTAL BRIEF FOR THE APPELLANT

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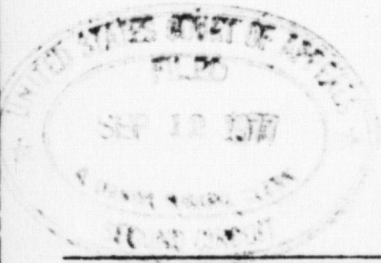


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In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2017

SALVATORE ANNUNZIATO,
Appellee

vs.

JOHN R. MANSON, COMMISSIONER
OF CORRECTIONS,
Appellant

On Appeal from the United States
District Court for the
District of Connecticut

SUPPLEMENTAL BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

The Appellant will incorporate into this Brief the Statement of Facts found at pages 1-3 of its original Brief in the above-captioned matter (copies of which will be re-filed together with this Supplemental Brief).

The Appellant adds to that original Statement of Facts that oral argument on the original briefs was had before this Court on April 21, 1977, as a result of which the original appeal was withdrawn without prejudice, in anticipation of the presentation of "additional evidence" before the District Court (Blumenfeld, J.) and in the hope that said "additional evidence" would eventuate in a different result in that court.

The "additional evidence" was presented before the District Court (Blumenfeld, J.) at Hartford, Connecticut on June 7, 1977.

On July 11, 1977, the court filed a Supplemental Memorandum of Decision indicating that it would adhere to the ultimate ruling of its original decision (see United States ex rel. Annunziato v. Manson, 425 F. Supp. 1272 (D.Conn. 1977)) even though the factual basis for the subsequent decision was barely recognizable from the one immortalized by the Court in Annunziato, Id.

On July 14, 1977, the Respondent, in response to the order of the Court of April 21, 1977, filed a Notice of Appeal in the District Court, and a Motion for an Expedited Appeal to this Court.

QUESTIONS PRESENTED

I. Whether the limitation on the cross-examination of Bruce Pino is of constitutional dimension and, if it was, whether the District Court erred in failing to honor the State Court's finding of fact that, in the context of Petitioner's trial, the error was harmless beyond a reasonable doubt?

II. Whether the District Court erred in finding, on the basis of the insufficient evidence before it, that someone in the State's Attorney's Office had knowledge of a "deal" made by one of its police-agents and, assuming the propriety of that determination, whether the District Court applied the proper standard in reviewing the impact of the withheld information on the outcome of Petitioner's trial?

STATEMENT OF FACTS

The Appellant, in this Supplemental Brief, will rely on the Statement of Facts already presented at pages 3-10 of its original Brief, which is being re-filed as part of the record on this present appeal.

ARGUMENT

I.

THE LIMITATION ON THE CROSS-EXAMINATION OF BRUCE PINO WAS NOT OF CONSTITUTIONAL DIMENSION AND, IF IT WAS, THE DISTRICT COURT ERRED IN FAILING TO HONOR THE STATE COURT'S FINDING OF FACT THAT, IN THE CONTEXT OF PETITIONER'S TRIAL, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Since none of the additional evidence presented before the District Court on June 7, 1977, could appropriately be said to have an impact on that court's finding that Davis v. Alaska, 415 U.S. 308, 914 S.Ct. 1105, 39 L. Ed. 2d 347 (1974) requires a new trial because the state court had limited inquiry on cross-examination as to the mere existence of pending charges against Bruce Pino (as opposed to any alleged "deal" with respect to those pending charges - the thrust of the subsequent Brady claim) and the court's ruling, at 425 F.Supp. at p.1277, indicates that this limitation on cross-examination, alone, would justify a new trial, it was inevitable that this issue would necessitate a further appeal to this Court, even had the District Court reversed its determination on the Brady claim.

The Respondent has nothing to add to the arguments already made on this question, as found at pages 10-17 of its original Brief filed in this matter and,

for the sake of economy, would refer the Court to the arguments made in that Brief.

II.

THE DISTRICT COURT ERRED IN FINDING, ON THE BASIS OF THE INSUFFICIENT EVIDENCE BEFORE IT, THAT SOMEONE IN THE STATE'S ATTORNEY'S OFFICE HAD KNOWLEDGE OF A "DEAL" MADE BY ONE OF ITS POLICE-AGENTS AND, ASSUMING THE PROPRIETY OF THAT DETERMINATION, THE DISTRICT COURT DID NOT APPLY THE PROPER STANDARD IN REVIEWING THE IMPACT OF THE WITHHELD INFORMATION ON THE OUTCOME OF PETITIONER'S TRIAL.

On June 7, 1977, the District Court (Blumenfeld, J.), at the request of the Respondent, and as allowed by the Second Circuit Court of Appeals (on April 21, 1977), heard, for the first time, the live testimony of various of the participants in the Petitioner's 1971 trial in the Superior Court of Connecticut.

The District Court had previously (without the benefit of such testimony) written a decision, in United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D.Conn. 1977), in which the court had charged the Office of the State's Attorney for New Haven County with "prosecutorial misconduct" and the solicitation of testimony which "bordered on perjury" from a key state's witness, Bruce Pino.

As if to justify the propriety of the Respondent's request for an opportunity to present "additional evidence" (and this Court's approval of that request), it should be noted that the District Court, having heard testimony regarding the events of 1971, has greatly modified its rendition of the factual situation surrounding Petitioner's trial, even though the ultimate ruling, that a new trial is mandated, remains.

The District Court was obviously less than pleased about the necessity for holding an evidentiary hearing (see pages 1-113 of the reporter's transcript, of the June 7, 1977, proceedings) on a matter where the "facts" had already been decided by the court without the need of such a hindrance.

In spite of the court's displeasure, however, it must be acknowledged that the factual situation relied on by the court in its Supplemental Memorandum of Decision bears little resemblance to the "facts" as outlined in Annunziato v. Manson, supra. Abandoned are the sweeping charges of "prosecutorial misconduct" and the allegation that the prosecution had solicited a perjured denial of "any promises" being made to Bruce Pino for his testimony against the Petitioner.

Instead, having heard the testimony of most of those who bore some relationship to Petitioner's trial (Pino was out of the state and, unfortunately, unavailable), the court took what it obviously considered to be the easiest way out of this factual and legal morass by deter-

mining that it would credit the testimony of Steven Ahern (the police Inspector who acknowledged making wide-ranging promises to Pino in return for his testimony against Petitioner) that Ahern had received authorization to make such a "deal" from "someone" in the State's Attorney's Office. By finding that someone in the office had given such approval, the court was able to constructively create a situation where the prosecution "knew" of the "deal" with Pino and was chargeable with having withheld this exculpatory information from the Petitioner's counsel, after his general request for "exculpatory information", and with having sat idly by when Pino misleadingly testified that no one had promised him anything in return for his testimony. As the court's footnote No. 1 on page 3 of the Supplemental Memorandum of Decision, Document No. 38 of the Record on Appeal, indicates the court's decision is predicated exclusively on the factual finding that some member of the State's Attorney's Office was aware of the agreement between Ahern and Pino.

This factual finding is, of course, demonstrably weak. The only evidence before the court that "someone" in the State's Attorney's Office had given the authorization to Ahern was Ahern's vague testimony (Tr. p. 67), that he had "checked" with "someone" in the State's Attorney's Office before he made the deal, although he could not recall to whom he spoke or from whom he got the authorization. Ahern's recollection, however, seemed to be based more on the

basis of what the "normal procedure" had been at the time and his assumption that this case had been handled in the normal fashion. The court makes the startling assertion (on page 4) of the Supplemental Memorandum) that the "most credible testimony presented to the court was that of Mr. Ahern." To counter Mr. Ahern's vague recollections, the Respondent offered the testimony of both Mr. Markle, who headed the Office of the State's Attorney in 1971 and Mr. Gaffney, then an Assistant State's Attorney, the individual who had actually conducted Petitioner's trial.

The court heard the testimony of Mr. Gaffney (Tr. pp. 78-81, 95-100, 108) indicating that he recalls specifically that he had an "understanding" with Pino that if he testified truthfully, his cooperation would be brought to the attention of the sentencing judge regarding his marijuana and second offender charges in the Superior Court, but this was all that anyone in the State's Attorney's Office was aware of regarding Pino.

Mr. Markle, the State's Attorney, testified that he could not recall ever having authorized anyone to guarantee Bruce Pino that he would not serve any time on his state charges in return for his testimony against Petitioner and he, himself, did not make such a promise; he never agreed to give Pino immunity on other charges that might have been brought against him (such as the arson and shooting cases) nor was he aware that anyone else might have made a "deal" regarding those charges; he never agreed to move Pino to another part of the

country, to help him get a new identity, etc., nor was he aware that anyone else had made such promises to Pino at the time of Petitioner's trial. (Tr. pp. 6,7,13,27,38). Since Mr. Markle knew nothing of the "deal" claimed by Pino and Ahern, he can hardly be faulted for not conveying this information to his assistant, Mr. Gaffney and, indeed, the court avoids finding that he personally had any knowledge.

The court fails to mention Respondent's Exhibit A (Tr. p. 9), which is the file jacket from the case of State v. Bruce Pino. This file contained various notations made by members of the State's Attorney's Office in the normal course of business there. Said file can be seen to contain the following notation:

"August 31, 1972 - Review of case indicates problems in proving possession. Accused also has cooperated in a number of trials for this office in which he testified as a state witness."

This entry was made by Bernard J. Lawlor, a former County Detective in the State's Attorney's Office, shortly before the nolle of Pino's marijuana and second offender charges was entered that same day - i.e., August 31, 1972.

This notation is significant in that there is absolutely no reference to the fulfillment of any previous "promise" or "deal" with regard to Pino by anyone

within the State's Attorney's Office and, secondly, the reference to the problems in proving possession would be (at the least) curious if, in fact, anyone in the State's Attorney's Office had previously made (or authorized) a "deal" with Pino. Had such a promise been made for Pino's testimony, the strength or weakness of the State's case against Pino would be quite irrelevant. Why even mention it?

The notation referred to was obviously entered in the ordinary course of business at the State's Attorney's Office and not in contemplation of this subsequent litigation. The Respondent claimed the exhibit as proof of the sincerity of its denial that a formal "promise" had ever been made or authorized by anyone in the State's Attorney's Office. The exhibit was obviously not as persuasive to the District Court as was Mr. Ahern's "vague" recollection of having received authorization from "someone" within the State's Attorney's Office.

Particularly does this appear to be a pre-determined position by the District Court in search of a justification when it becomes apparent that the court has had to totally disregard the sworn testimony of Mr. Gaffney, the Assistant State's Attorney who prosecuted the Petitioner in 1971. Mr. Gaffney testified that he told the witness, Pino - and Pino acknowledged understanding - that the consideration he would receive for his truthful testimony in the Annunziato matter would be that his co-operation would be brought to the attention of the sentencing judge. (Tr. pp. 78,79). Mr. Gaffney testified that

he recalls specifically telling Pino that that was the office policy at that time and that was the type of consideration that he (Pino) was going to get. He recalled, further, that Pino said that he understood that to be so (T. pp. 80,81).

Significantly, Mr. Gaffney testified that Mr. Ahern (whom the District Court found to offer "the most credible testimony") was present throughout the trial of Petitioner and he never came to Mr. Gaffney claiming that Pino was concerned about the State's backing out of any "deal." (Tr. pp. 82,83). Since Ahern admitted to being a participant in the "deal" with Pino, it would be reasonable to assume that Pino would go to him if he thought he was being cheated out of any agreement he had previously reached, but this did not occur.

In total disregard of the aforementioned specific testimony, the District Court chose to credit the vague recollections of Mr. Ahern that he had received authorization from "someone" within the State's Attorney's Office. It would appear that one reason the court has made such a crucial finding on such a demonstrably weak basis is the court's near-obsession with a stipulation entered by the State's Attorney's Office during the state habeas corpus proceedings before Judge Martin in Litchfield County. The so-called stipulation has been printed in full, as footnote 5, on pages 9 and 10 of the Supplemental Memorandum of Decision. In that stipulation, the Respondent agreed that the State's Attorney's Office had agreed to give Bruce Pino favorable treat-

ment in return for his testimony in the Petitioner's case. This admits nothing more, however, than the facts testified to by Mr. Gaffney - i.e., that Pino's testimony would be brought to the attention of the sentencing judge. It should be noted what the stipulation does not stand for in any reasonable reading, to wit:

a) There is no admission that anyone in the State's Attorney's Office participated in, authorized, or even was aware of the extensive "deal" testified to by Pino in the Porto case or by Mr. Ahern before the District Court;

b) There is no admission that Mr. Markle ever participated in the making of any "deal" between Pino and those named by Pino (in the Porto case) on January 27, 1970; and

c) There is not even an admission that the State's Attorney's Office had ever promised to do what eventually occurred - i.e., nolle the pending charges - since the ambiguous phrase "favorable treatment" was used in the stipulation and this could take many forms.

In short, there was clearly insufficient evidence before the District Court upon which to base its conclusion - the only factual conclusion reached by the court - that someone within the State's Attorney's Office had authorized and was aware of the promise of immunity to Pino

on his state charges in return for his testimony in the Petitioner's case.

Since the Respondent continually denies that anyone in the State's Attorney's Office had such knowledge, it is particularly galling to have the District Court order a new trial for the Petitioner because the prosecution failed to reveal exculpatory information (i.e., the "deal") about which it never had knowledge, actual or constructive.

Further error on the District Court's part occurs, however, when it employs the standard that "I think it plain that the concealment of the deal could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); Giglio v. United States, 405 U.S. at 154.

It is submitted that the Giglio case is inapplicable to the present set of circumstances and the much stricter standard found in Agurs should be the applicable standard. This is particularly true where, as here, the undisclosed evidence is useful only for impeachment purposes. Garrison v. Maggio, 540 F. 2d 1271, 1273-74 (5th Cir. 1976). Agurs states that the non-disclosure of exculpatory evidence is constitutional error, when the defendant had made only a general, unspecific request for "exculpatory information," only when the undisclosed evidence creates a reasonable doubt which did not otherwise exist. United States v. Agurs, 427 U.S. 97, 112-13 (1976). The

District Court's failure to employ this more exacting standard is curious in light of the court's other ruling in Moynahan v. Manson, 419 F. Supp. 139, 1145 (1976), where the District Court (Blumenfeld, J.) ruled on a factual situation quite similar to the instant case:

"The petitioner's second claim is that despite a request for all exculpatory information in the possession of the prosecution, the State failed to timely deliver material which demonstrated Miller's criminal involvement and that he had been a target of the State Police investigation. This, the petitioner claims, violated his right to due process. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10L. Ed. 2d 215 (1963).

At the outset it must be noted that, although the defense made a specific and lengthy request for exculpatory evidence, it did not request any material specifically concerning Mr. Miller. Therefore the standard this court must apply in weighing the petitioner's claim is to determine whether, had he been able to present the withheld evidence to the jury, it would have created a reasonable doubt that did not otherwise exist. United States v Agurs, ___ U.S. ___ 96S. Ct. 2392, 49L. Ed. 2d 342. (1976)."

What the District Court never approaches explaining in its Supplemental Memorandum of Decision is why the above standard applies to the factual situation in Moynahan but the far-less exacting standard employed by the court from Giglio, supra, where a new trial would be required if "the false testimony could...in any reasonable likelihood have affected the judgment of the jury." In footnote 1 on page 3 of the Supplemental Memorandum of Decision, the District Court indicates that it does not have to determine whether the less-stringent standard from Giglio is applicable, because he found as a fact that some member of the State's Attorney's Office was aware of the agreement. Since there was clearly insufficient evidence to reach that conclusion and the District Court never reached a factual determination on whether the prosecution, under Giglio, "knew or should have known" of the allegedly perjured testimony, it was inappropriate for the Court to employ that less-stringent standard of materiality.

In short, the District Court could not evade the issue of whether the prosecution knew or should have known of the perjured testimony and decide simply that someone in that office knew or should have known of the promises made to Bruce Pino (a totally different issue), without employing the more restrictive standard of review called for in Agurs, supra, and Moynahan (Blumenfeld, J.), supra.

It is submitted that the less restrictive standard is used by the court because it could not reasonably find, on

the facts of this case, that if the "deal" had been disclosed, "it would have created a reasonable doubt that did not otherwise exist." Agurs, supra.

The District Court has employed the standard of review used by the Supreme Court in Giglio v. United States, 405 U.S. at 154, where the failure to disclose promises of leniency to a witness require a new trial if "the false testimony could...in any reasonable likelihood have affected the judgment of the jury." The District Court, at the same time, has refrained from finding facts which would bring what happened in the present case within the parameters of the Giglio situation. The court did not decide whether the prosecution knew or should have known about the allegedly perjured testimony, and decided only that exculpatory evidence was withheld from the Petitioner after a general request for "exculpatory information." Such a factual situation fits most appropriately under the third category in Agurs, supra, (the strictest standard of materiality), where a new trial will be ordered only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97 112-113 (1976).

Had the District Court applied the proper standard, there is every reason to believe that the failure to divulge the prosecution's "agreement" with the witness (whatever it was and by whomever it was made) would be seen as nullified by the many other ways in which the jury was able to evaluate Pino's motivations for testifying as a state's witness.

As the District Court has indicated in the Supplemental Memorandum of Decision (pg. 8), during Petitioner's trial, "Pino's credibility was bitterly contested." This is not a case where a witness has been presented as virtuous, a casual observer, or uninterested in the outcome of the trial. Since a reviewing court, under the Agurs case, must make a case-by-case evaluation of the impact of withheld information on the question of whether a new "reasonable doubt" is created, the transcript of the original trial must be studied in each instance to make such an evaluation.

When such a review of the Petitioner's trial is made, it should become clear that the jury (which originally found no reasonable doubt of Petitioner's guilt) was sufficiently apprised of Pino's motivations for testifying and there is no reason to believe that if the jury was made aware of the additional fact that the witness, in addition to serving no "time" on his federal charges (which the jury knew) was also not going to receive "time" for any state charge, they would have reached a different verdict as to Petitioner's guilt.

As the Supreme Court of the State of Connecticut ruled in State v. Annunziato (363 A.2d 1011, 1017):

"On cross-examination the defense brought out that Pino had been convicted of (1) possession of burglary tools, (2) four counts of statutory burglary, (3) conspiracy to violate 18 U.S.C. 2113 (9)

which involved bank robbery, and (4) possession and passing of counterfeit money. Pino denied having been convicted of possession of firearms in Florida. At the beginning of Pino's direct testimony, he admitted to these crimes, plus attempted breaking and entering. On cross-examination defense counsel also brought out that Pino decided to talk to the police just prior to being tried for bank robbery [Tr. p. 726], that Pino, when he talked to the police about the Gould incident was hoping for leniency [Tr. pp. 843, 844, 845], that Pino knew he could get up to twenty-five years on the federal bank robbery charges [Tr. p. 8407]; that Inspector Ahern of the New Haven Police Department had told him that he would do everything in his power to secure leniency in the federal case [Tr. p. 845]; and that after Pino talked to the police about the Gould incident he subsequently received a suspended sentence in the bank robbery case. [Tr. p. 844]. It was also elicited that Pino had signed a written confession admitting the crime of arson, and that he had never been arrested for this crime. [Tr. p. 842]. He was also questioned about his extensive and illegal use of drugs. [Tr. pp. 850-855]. Another witness testified for the defense that while in jail with Pino, Pino told him that Mr. Ahern told him [Pino] if he could come up with some concrete information about [the Petitioner]...they would drop his bank robbery charges." [Tr. p. 975].

The District Court, employing the standard of whether there is a reasonable possibility that a jury learning of the withheld information (i.e., the specific "deal") would reach a different result, found that there was such a possibility. Had the District Court employed the appropriate standard, from Agurs, supra, of whether the withheld information created a reasonable doubt which did not exist previously, the many factors just above cited, which would have given any reasonable jury an insight into the motivations of the witness, Pino, for testifying, would rule out the possibility of such a finding. It is impossible to believe that the jury in Petitioner's trial would have found a reasonable doubt of his guilt had they heard, as fact, what was perfectly obvious anyway - i.e., that Bruce Pino was saving himself even while he condemned Petitioner.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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